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Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

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G. DUDLEY PEARCE,

Petitioner

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

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10017 Latimer Court
Fairfax, Virginia 22032
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## QUESTIONS PRESENTED FOR REVIEW

I.

Are District Courts of the United States without authority to enjoin deliberate and continuing unlawful acts of reprisal committed by federal officials against a federal employee for the exercise of his or her First Amendment rights, and require corrective action when the United States would not provide lawful grievance procedure and deliberately interposed barriers to impartial review and relief?

II.

When substantive personnel rights created by the Civil Service Reform Act of 1978 (CSRA) and other statutes are withheld because federal officials charged with the duty to issue implementing regulations and procedures will not do so, and injury to an employee results, are District Courts of the United States without authority to compel issuance of implementing regulations and procedures?

III.

Should this case have been dismissed under Fed. R. Civ. P. 12(b)(6) where petitioner alleged such reprisals, abuse of authority, and failure to implement the law?

## PARTIES

Petitioner: G. Dudley Pearce, pro se.

Respondents: United States of America;

Veterans Administration (VA);

Administrator of Veterans Affairs;

VA General Counsel;

Robert E. Coy, as VA Deputy General Counsel;

VA Assistant General Counsel, Professional Staff Group II;*

Chairman, Board of Veterans Appeals;

Office of Personnel Management (OPM);

Director of OPM.

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*Suit originally named as a defendant "Norman C. Paulson, as VA Assistant General Counsel," in his official capacity. Because of his retirement on May 31, 1985, his successor is named by title only.

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

G. DUDLEY PEARCE,

Petitioner,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner, G. Dudley Pearce, petitions for a writ of certiorari to review the judgment rendered by the United States Court of Appeals for the District of Columbia Circuit.

## OPINIONS BELOW

The judgment of the Court of Appeals (App. A, infra) was without opinion. The opinion of the District Court (App. B, infra) is unreported.

## JURISDICTION

The judgment of the Court of Appeals was entered February 26, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

This case involves the following constitutional and statutory provisions: U.S. Const. art. III, §§ 1, 2, amend. I, amend. V; United States Code title 5, §§ 552, 552a, 702, 1104, 1206, 2101, 2103,

2105, 2301, 2302, 3320, 4103, 4302, 4302a 5401, 5407, 7211, title 28, §§ 1254, 1331, 1361, 1651, 2201, 2202. It also involves the following rules and regulations: Fed. R. Civ. P. 12(b)(6); Code of Federal Regulations title 5, §§ 6.3, 213.3101, 213.3102, 293.302-304, 302.102, 771.301-304, title 38, §§ 0.735-10, 0.735-21. See, App. C, et seq., infra.

## STATEMENT OF THE CASE

### Preface

The petitioner is a senior-level staff attorney, "schedule A," Grade GM-14, employed in the Office of General Counsel of the Veterans Administration (VA). His legal, quasi-legal, and administrative experience in VA Central Office and VA field stations spans 27 years. He has,

under merit pay, enjoyed fully and highly satisfactory performance appraisals.

This is an action for nonmonetary relief, principally as follows:

1. It is to restrain certain VA officials from punishing the petitioner for the exercise of his First Amendment rights.

2. It is to require the respondents to adopt rules and procedures to protect the petitioner's right as a Government attorney to the merit system principles of the Civil Service Reform Act of 1978 (CSRA).

3. It is to require the VA to provide a procedure to assure the impartial review of grievances.

PROCEEDINGS

1. Nonjudicial

The petitioner began this action with an informal grievance, filed February 20, 1981, followed by a formal grievance, filed March 23, 1981. On May 15, 1981, respondent Robert E. Coy, then the Acting VA General Counsel, assumed the role of "deciding official," even though he was one of the principal parties against whom the petitioner had complained. In that role, he decided that neither he nor his subordinate supervising attorneys (and other high officials specified in the grievance) had violated the petitioner's rights. Ultimately, on March 26, 1982, the VA Deputy Assistant Administrator for Personnel and Labor Relations issued a final denial of the grievance, refusing to make

findings of fact, rule on the merits, and take appropriate corrective action.[1]/

## 2. Judicial

Having failed to obtain impartial review of his complaints, the petitioner, on June 27, 1983, filed suit in the United States District Court for the District of Columbia, for mandamus and declaratory and injunctive relief. Jurisdiction was claimed under 5 U.S.C. § 702; 28 U.S.C. §§ 1331, 1361, and 2201.[2]/ The District

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1/ The chronology, found at pages 9-18 of Appendix for Appellant (in Appeals Ct.), shows the great lengths to which the United States resisted the petitioner's every effort to obtain impartial non-judicial review of his complaints (e.g., the Special Counsel refused to investigate; the Office of Inspector General would not allow him to meet with an investigator).

2/ Jurisdiction also claimed under the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(B), and the Privacy Act, 5 U.S.C. § 552a(g)(1).

Court, on January 23, 1985, by memorandum opinion and order, dismissed the complaint "in its entirety with prejudice," under Fed. R. Civ. P. 12(b)(6) App. B, infra). By order filed February 26, 1986, the Court of Appeals for the District of Columbia affirmed the judgment, without opinion, "for the reasons set forth in the District Court's opinion" (App. A, infra).

## VA OFFICIALS PUNISH PETITIONER FOR THE EXERCISE OF HIS FIRST AMENDMENT RIGHTS

### 1. These Are The Expressions For Which The Petitioner Is Being Punished.

The petitioner complained, and thoroughly documented, that high VA officials, particularly Messrs. Coy and Paulson, committed, and continued to commit, acts of reprisal against him because of the

following First Amendment expressions:

(1) He stated only what he knew to be the truth when he was called upon to give a statement as a witness in an administrative action against another employee; and

(2) He filed a grievance and otherwise objected, appropriately and in channels, to unlawful and wasteful practices.

[Complaint, Count Two and supporting exhibits.]

2. Respondents Committed These Acts of Reprisal.

Counts two and four of the Complaint alleged, among other things, that the petitioner was punished as follows:

(1) General Counsel officials

improperly withheld management (MPI) appraisals due the petitioner and requested by the VA's Personnel department (EX II-12--DE 1);

(2) General Counsel officials illegally caused a radical reduction of the petitioner's management (MPI) score (EX I, II, p. 2.--DE 1);

(3) The VA would not acknowledge and process the petitioner's applications for attorney positions (some were "lost")(EX MB, MB-1, etc.--DE 1);

(4) The VA would not process the petitioner's incentive-awards suggestion (and "lost" it)(EX L-1--DE 1);

(5) General Counsel officials

improperly denied the petitioner's reasonable requests for training (EX III--DE 1);

(6) General Counsel officials refused the petitioner's request for credit due for training received EX II--DE 1);

(7) General Counsel officials improperly withheld commendatory material from the petitioner's Official Personnel Folder (EX MP--DE 1);

(8) General Counsel officials improperly and without notice created, circulated, acted upon, and filed false personnel records concerning the petitioner (EX II; II-13; II-16--DE 1);

(9) Respondent Coy, Deputy General Counsel, blanked out significant portions of copies of requested official personnel records pertaining to the petitioner (EX II; II-15--DE 1);

(10) A General Counsel official intimidated the petitioner when he pursued his improperly denied FOIA request (EX L-1, p. 3---DE 1); and

(11) General Counsel officials improperly denied the petitioner opportunities to compete for appointment to District Counsel and other supervisory attorney positions; thus, they unlawfully denied him appointment to those positions (EX III--DE 1).

[Complaint, Count Two and portions of Count Four, and supporting exhibits.]

The respondents take the position that these are "trivial personnel complaints." The petitioner insists they are serious. The District Court, failing to recognize the scope and seriousness of the matter, summarized these by stating that the petitioner had complained that he "was effectively blocked for promotion" (App. B-9, infra).

## THE RESPONDENTS OPERATE AN ILLEGAL PERSONNEL SYSTEM

The petitioner complained that the respondents denied his rights by operating an illegal personnel system, by engaging in such practices that follow. He complained that they refused to provide appropriate

notice of grades 14 and 15 attorney position openings, and that they preselect those to fill them. He complained that they refused to adopt rules and procedures that would assure the selection and promotion of "schedule A" Government attorneys are based on merit alone; therefore, they refuse to implement for "schedule A" attorneys the merit system principles of the Civil Service Reform Act of 1978 (CSRA), which Congress intended for them to have.

[Complaint Counts Three, Four, and supporting exhibits.]

THE RESPONDENTS DENIED PETITIONER'S RIGHT TO PETITION FOR REDRESS

The petitioner complained that the United States, by its agents, improperly

denied his right to petition for redress of grievances -- (1) by furnishing him a grievance procedure that was antiquated and unfair; and (2) by manipulating the processing of his complaints. He complained that such actions denied him the impartial review and adjudication to which he was entitled. [Complaint Count One and supporting exhibits.]

The respondents, in the District Court, did not deny these allegations. Rather, they defended primarily on the grounds that the Constitution does not require any particular form in which to air grievances. They also urged that the petitioner did not have standing to complain that the VA had violated its own regulations and those of OPM. The District Court substantially agreed, though it did not address his complaint that the VA had violated its own

regulations.

## REASONS FOR GRANTING THE PETITION

### REASONS SUMMARIZED

1. The judgment of the Appeals Court, affirming that of the District Court, was in serious error because its effect was diametrically opposite to the precedents of this Court, as well as its own.

2. A person must be free to give testimony as a witness in an administrative proceeding without fear of being punished for telling only the truth.

3. An employee must be free to object, appropriately and in channels, to improper personnel practices and poor management, without fear of punishment.

4. It is urgent the the Court address the status of "schedule A" Government attorneys in light of the Civil Service Reform Act of 1978 and the Constitution. Over seven years have passed since the CSRA was enacted, but Government attorneys still are unable to obtain the benefit of its provisions.

5. It is imperative that judicial review be granted where the complaint asserts Constitutional and other serious violations, and impartial administrative review was unavailable or inoperative.

## REASONS DISCUSSED

### 1. Fed. R. Civ. P. 12(b)(6) Does Not Apply.

It is well settled that a complaint may not be dismissed for failure to state

a claim upon which relief can be granted unless it appears beyond a doubt that the plaintiff can prove no set of facts which would entitle him or her to relief. E.g., Conley v. Gibson, 355 U.S. 41, 45-46 (1957). For this purpose, the complaint must be construed in the light most favorable to the plaintiff. Hughes v. Rowe, 449 U.S. 5, 10 (1980); Cruz v. Beto, 405 U.S. 319, 322 (1972).

2. Respondents Sought to Chill the Petitioner's First Amendment Expressions.

It is well settled that a person may not be denied a valuable government benefit, or otherwise punished by government officials, for the exercise of his or her First Amendment rights. Mt. Healthy City Bd. of Ed. v. Doyle, 429 U.S. 274 (1977); Perry v. Sinderman, 408 U.S. 593, 597-598

(1972); Clark v. Library of Congress, 750 F.2d 89 (D.C. Cir. 1984)(non-promotion case). Is equally clear that it is appropriate in such cases for federal courts to review such complaints, require corrective action, and restrain further such conduct. Id. (see esp. Clark at 102). Even though the petitioner developed this argument in the District Court and in the Court of Appeals,[3/] it was overlooked by both. The District Court opinion, adopted by the Court of Appeals, dealt with the First

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3/ Although the complaint did not specify that such punishment violated Amendment I, that claim was clearly implied in the facts alleged in Count One and part of Count Four, and developed in the arguments in the District Court and the Court of Appeals. See, plaintiff's memo of 2-22-84, pp. 29-31; appellant's brief, pp. 19-21; and appellant's reply brief, pp. 31-32.

Amendment only as it pertained to the denial of the petitioner's right to petition for redress (App. B-3--B-8).

As outlined, the petitioner claimed numerous instances in which he has been punished by respondents for the exercise of this First Amendment rights. Because such matters are reviewable, the District Court had the authority and occasion to consider the case on the merits, declare his rights, mandate compliance with the law, and otherwise require corrective action. Accordingly, his claim should not have been dismissed under Rule 12(b)(6), and the dismissal should have been reversed by the Court of Appeals.

### 3. Respondents Violated the Petitioner's Due Process and Equal Protection Rights Guaranteed by the Fifth Amendment

The District Court condensed the allegations of Counts Two, Three, and Four of the complaint as follows: (1) The petitioner "was effectively blocked for promotion;" and (2) the VA does not utilize procedures that assure that attorney selections are based upon the merit system principles. [See, App. B-9, infra.] This limited characterization indicates that the Court did not have a full understanding of the scope and seriousness of the major counts of the complaint.

More accurately, the petitioner complained that the acts of reprisal and unlawful personnel system foreclosed all opportunity to make effective application

for other attorney positions in the VA, including those involving promotion. In fact, the petitioner alleged and documented specific instances in which certain of the respondents denied him the opportunity to effectively complete for such positions, and denied him appointment to those positions.

Such closing off of career opportunities for unconstitutional reasons placed him in a position inferior to other similarly-circumstanced attorneys. Thus, he was, without due process, denied both the equal protection inherent in the Fifth Amendment Due Process Clause and the liberty to compete for such positions.

4. Respondents Deny the Petitioner, a Schedule A Attorney, CSRA Benefits and Equal Protection.

The respondents admitted that "schedule A" attorneys are entitled to the merit

system principles of the Civil Service Reform Act of 1978, codified at 5 U.S.C. § 2301 (see App. C-9, C-10, infra). Nevertheless, they refuse to adopt rules and procedures that implement them, even though they are required by law to do so (see, e.g., 5 U.S.C. § 1104(b)(3), App. C-6, C-7, infra). Furthermore, as seen in the present case, they will not apply these principles in selections and promotions of attorneys.

The petitioner takes the position that the merit principles are not accorded without the announcement of attorney position openings, and without some impartial, systematic ranking and selection process.[4]/

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[4]/The petitioner does not claim that "schedule A" (excepted service) attorneys are required to take a formal, written examination. He does, however, claim that the law requires job announcements and a ranking process similar to the procedures employed in the competitive service (see 5 U.S.C. § 3320-App. C-15, infra).

The respondents claim these principles are afforded by informal process. Their practices of manipulating job applications and unlawfully preselecting attorneys to fill such positions, based upon favoritism independently of merit, belie such defense. The reprisals against the petitioner found fertile opportunity in such unlawful and unfair system.

The District Court permitted OPM regulations to excuse the VA from adopting procedures to afford merit principles to VA attorneys (see, App. B-10, infra). However, the court, in doing so, overlooked the point that the petitioner was complaining, in part, that OPM would not adopt rules to afford attorneys such protections, so as to implement the CSRA.

Therefore, the courts erred in finding

that the petitioner did not have standing to challenge violations of his rights to the CSRA's merit principles, and in failing to find such system violated his due process rights, including equal protection.

5. Respondents Violated the Petitioner's Right to Petition for Redress of Grievances.

The Constitution and Federal Regulations required that the respondents provide the petitioner a means by which he could have his important grievances impartially reviewed and adjudicated. U.S. Const. Amendments I, V; 5 C.F.R. § 771.301, et seq.; 38 C.F.R. § 0.735-10--App. C-1, C-26 through C-29, infra. Neither the procedure nor the processing approached the high standards of those provisions.

(a) The VA Caused the Petitioner to Utilize a Grievance Procedure That Was Antiquated and Unfair.

The VA furnished the petitioner with a grievance procedure that had long been out-of-date. Critical elements of the procedure referred to the Civil Service Commission (CSC) and CSC regulations, both of which had ceased to exist. The procedure also referred to VA officials who no longer existed (see, Appellant's App. 77A-82A--Appeals Court).

While it is true, as the lower courts concluded, that neither the Constitution, the statutes, nor the regulations specifies any particular form of grievance procedure, those provisions are without meaning if they do not require some form of grievance procedure that assures impartial review and adjudication of legitimate

complaints. The lower courts erred in failing to find that the VA's grievance procedure violated the standards of the cited provisions of the Constitution and Federal Regulations.

(b) From Inception of the Processing to the Conclusion, the United States Made No Effort to Discover Its Faults and Take Corrective Action.

The United States caused the petitioner to perform various procedural exercises, but refused to take an honest look at whether the respondents were violating the petitioner's rights. The "considerable attention" the grievance received, noted by the District Court, was aimed toward covering up the malfeasance of high VA officials, not toward ascertaining the truth and taking needed corrective action.

An example of this happened on April 2, 1981, at which time the petitioner asked a VA personnel official the status of his grievance and requested appointment of an impartial grievance examiner. The official told the petitioner that he did not know the status; that the petitioner could not contact the personnel officials who knew; and that it could take as long as a year to have a grievance examiner appointed. EX C, pp. 3,4, G-17--DE 1. The later offer of respondent Coy to have a grievance examiner appointed was a useless gesture. He, as Acting General Counsel, had already issued a decision that neither he nor the other accused officials had done anything wrong.

Such manipulations did not comply with the high standards of the onstitution and

applicable regulations. The lower courts erred in failing to find these violations.

## CONCLUSION

The petitioner, in his briefs, brought to the Court of Appeals' attention numerous errors in the District Court's opinion--errors which revealed that the court did not fully comprehend the scope and seriousness of the complaint, and the issues it presented. The Court of Appeals erred in failing to recognize these and to reverse the District Court Ruling.

The important issues of this case go to the heart of the American system--the freedom to be a witness; the right to appropriately criticize the Government without being punished; the restraint of the unlawful exercise of power; the

freedom to compete in the employment arena; and the right to meaningful petition for redress of grievances. Without assistance of this Court, the unlawful acts will continue unabated and unredressed.

In view of the foregoing, the petitioner urges the Court to grant the writ of certiorari.

Respectfully submitted,

G. Dudley Pearce
Petitioner, pro se

# APPENDIX

# A

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-5288

September Term 1985
Civil Action
No. 83-1854

G. DUDLEY PEARCE

Filed Feb. 26, 1986

Appellant

v.

UNITED STATES OF AMERICA, et al.

Appellee

On Appeal from the
United States District Court
for the District of Columbia

Before: WRIGHT, EDWARDS and BUCKLEY, Circuit Judges.

ORDER

This cause came on to be heard on the record on appeal from the United States

District Court for the District of Columbia, and was briefed and argued by counsel for appellant and appellee. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the court. See Local Rule 13(c). On consideration of the foregoing and for the reasons set forth in the District Court's opinion, it is

ORDERED and ADJUDGED, by this court, that the judgment from which this appeal has been taken is affirmed. It is further ORDERED and ADJUDGED, by this court, sua sponte, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See Local Rule 14, as amended on November 30, 1981 and June 15, 1982. This instruction to the Clerk is

without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

Per Curiam
FOR THE COURT:

(signature)

George A. Fisher
Clerk

# APPENDIX

# B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | | |
|---|---|---|
| G. DUDLEY PEARCE, | ) | |
| | ) | |
| Plaintiff | ) | |
| v. | ) | C.A. No. 83-1854 |
| | ) | |
| UNITED STATES OF AMERICA, et al., | ) | |
| | ) | FILED |
| Defendants | ) | Jan. 24, 1985 |

MEMORANDUM OPINION AND ORDER

The plaintiff, G. Dudley Pearce, is an attorney employed by the Office of General Counsel of the Veterans Administration. Acting pro se, the plaintiff filed the complaint in this action against the United States, the Veterans Administration (VA), several VA employees in their official capacity, the Office of Personnel Management (OPM), and the Director of OPM. The complaint seeks declaratory, injunctive and equitable relief against these defendants for alleged violations of

plaintiff's constitutional and statutory rights in connection with his employment. This case is presently before the Court on defendants' motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

A complaint may be dismissed for failure to state a claim upon which relief can be granted only where it appears beyond doubt that plaintiff can prove no set of facts which would entitle him to relief. E.g., Bouchet v. National Urban League, Inc., 730 F.2d 799, 805 (D.C. Cir. 1984) (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). For this purpose, the complaint is to be construed in the light most favorable to the plaintiff. E.g., Shear v. National Rifle Association of America, 606 F.2d 1251, 1253 (D.C. Cir. 1979). Nevertheless, even accepting

plaintiff's allegations and all reasonable inferences therefrom as true, this Court concludes that defendants' motion to dismiss must be granted.

## Discussion

The first count of plaintiff's complaint alleges that the defendants failed to provide proper review procedures for a grievance filed by the plaintiff with the Veterans Administration on March 31, 1981. Plaintiff alleges that the grievance procedures provided by the VA are antiquated, deficient and unfair, and that plaintiff was thereby denied an impartial review and adjudication of his complaint in violation of his First Amendment right to petition the Government for redress of grievances, his Fifth Amendment due process rights and various OPM regulations.

Plaintiff initially filed his grievance with the VA pursuant to the grievance procedures established at 5 C.F.R. § 771, et seq., complaining of various employment practices utilized by the VA. On May 15, 1981 the VA issued a response to all of the matters raised in plaintiff's grievance. The response informed the plaintiff that if he was dissatisfied with the response, he could request the appointment of a VA examiner to further consider his complaint. By memorandum dated May 22, 1981 the plaintiff informed the VA acting General Counsel that he was dissatisfied with the May 15, 1981 response, but regarded the option of seeking appointment of a Grievance Examiner as unacceptable, and that he would turn his requests for relief to avenues outside of the VA.

The OPM regulations cited by the

plaintiff do not establish any basis for plaintiff's first cause of action. The regulations cited by plaintiff do in fact provide that covered agencies, including the Veterans Administration, are to establish an agency grievance procedure that meets certain criteria, see 5 C.F.R. §§ 771.301-771-302, and that the Office of Personnel Management is to review those grievance procedures from time to time. 5 C.F.R. § 771.304. However, the regulations also explicitly stated that OPM will not act on any individual request to review procedures used in processing a grievance, or the decision rendered with respect to any grievance. See 5 C.F.R. § 771.304. Consequently, those regulations create no private right of action for the plaintiff.

Furthermore, although the First

Amendment guarantee of the right to petition the government for redress of grievance applies to all departments of the government, including agencies of the executive branch as well as the courts and legislature, see e.g., California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 509-10 (1972), that right does not entitle an individual to any particular form or structure within which to air his concerns. Cf. Pell v. Procunier, 417 U.S. 817, 822-828 & nn. 5-6 (1974) (restricting prisoners from face-to-face access with press not violative of prisoners' right to petition government for redress of grievances given alternative means of communications). Instead, the right protects against the government

effectively prohibiting or restraining the actual intended communication,[1]/ or taking threatening adverse action against one who makes such a

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[1]/ See Bill Johnson's Restaurants, Inc. v. NLRB. ____ U.S. _____, 103 S. Ct. 2161, 2169 (1983) (First Amendment right to petition protects right to file legal action with a "reasonable basis"; employer's state-court action against employees who picketed restaurant could not be enjoined as unfair labor practice unless suit baseless retaliatory action); California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972) (antitrust laws may not be construed to prohibit filing of a lawsuit or activities at agency level despite anticompetitive intent given First Amendment petition rights unless activities mere sham for harassment purposes); Johnson v. Avery, 393 U.S. 483, 485 (1969) (First Amendment right to petition government for redress of grievances includes access of prisoners to the courts for purposes of presenting their complaints).

communication.[2]/ Despite plaintiff's apparent dissatisfaction with the VA's handling of his grievance and with the result of the agency's review, the record clearly reveals that his grievance did in fact receive considerable attention. Accordingly, plaintiff's First Amendment claims must fail.

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[2]/ See Whitehall v. Elkins, 389 U.S. 54 (1967) (requiring state university teachers to sign oath that they would not engage "one way or another" in overthrow of government with risk of conviction for perjury so broad as to violate First Amendment rights, including right to petition for redress of grievances); United States v. Hylton, 710 F.2d 1106, 1110-11 (5th Cir. 1983) (criminal prosecution of appellee for intimidating and impeding IRS agents by filing trespass action against agents violated appellee's First Amendment right to petitionfor redress of grievances given that appellee's trespass action against the agents was not frivolous).

Likewise, in the absence of any right or entitlement to a particular form of grievance procedure, this Court can find no violation of plaintiff's Fifth Amendment rights. See Board of Regents v. Roth, 408 U.S. 564 (1974).

Counts two, three and four of plaintiff's complaint allege that plaintiff was effectively blocked from promotion within the Veterans Administration, in violation of his Fifth Amendment rights and the Civil Service Reform Act, because the plaintiff voiced his criticism of VA personnel policies and because the agency does not utilize procedures that will ensure that attorney selection procedures are made in accordance with the merit systems principles embodied in the Civil Service Reform Act, 5 U.S.C. §§ 2301-02.

As an attorney with the VA, however,

plaintiff is in the "excepted service." See 5 C.F.R. § 302.101(c)(10). Decisions relating to promotions in the excepted service are essentially committed to agency discretion as a matter of law, without applicable competitive or formal procedures for filling such positions. See 5 C.F.R. §§ 6.1; 6.3(b); 300.101; 302.101 (c)(10). Consequently, to the extent that the agency may exercise unfettered discretion in its selections for promotion, plaintiff does not have a liberty interest in connection with the agency's promotional policies to support a due process claim under the Fifth Amendment. Board of Regents v. Roth, 408 U.S. 564 (1972). Likewise, plaintiff's interest in a promotion, and in securing a change in promotion policies, is not a property interest given that plaintiff has no entitlement to a

promotion. E.g., Colm v. Vance, 567 F.2d 1125 (D.C. Cir. 1977). Finally, with respect to plaintiff's assertion that the agency's promotional policies are in violation of the merit system's principles embodied in the Civil Service Reform Act, 5 U.S.C. §§ 2301-02, in Carducci v. Regan, 714 F.2d 171 (D.C. Cir. 1983), the Court of Appeals for this circuit held that judicial review of alleged violations of the Civil Service Reform Act (CSRA) is available only for major personnel actions under the CSRA, namely adverse actions resulting in demotion or removal, see 5 U.S.C. §§ 7501-7701, and then only after exhaustion of the CSRA's extensive administrative remedies for such adverse actions. Id. at 175-77. Plaintiff remains employed at the Veterans Administration and has not been demoted from any position as the

result of the deficiencies in the agency's personnel policies that he alleges. Accordingly, no cause of action under the Civil Service Reform Act is properly before this Court.

In his fifth cause of action the plaintiff alleges that the Prrivacy Act, 5 U.S.C. § 552a, et seq., was violated by the Veterans Administration failure to maintain accurate, relevant, timely and complete records pertaining to his personnel files, and that these violations were detrimental to personnel decisions made by the Veterans Administration with respect to his employment. Specifically, plaintiff alleges that his records were inaccurate and incomplete, in violation of 5 U.S.C. § 552a(e)(5), in that officials of the Veterans Administration Office of the General Counsel failed to complete a

Management Personnel Inventory (MPI) appraisal of plaintiff's performance in August 1979 knowing that such evaluations are necessary to be considered for promotion. Plaintiff further alleges that when MPI appraisals were completed in August 1980 false appraisals were given, lowering plaintiff's previous MPI "score" in retaliation for plaintiff's criticism of the Office of General Counsel's employment practices, and that memoranda based on this false appraisal were placed in his file. Plaintiff also alleges that his personnel records are inaccurate and incomplete in violation of the Privacy Act, 5 U.S.C. § 552a(e)(5), because his personnel file did not reflect credit for a labor/personnel training seminar that he attended, and did not contain a memorandum written in June 1982 by the Assistant

General Counsel of OGC commending the plaintiff for his work. Finally, plaintiff alleges that a "secret memoranda" containing deliberately false information about the plaintiff's qualifications were not placed in plaintiff's file, thereby violating the provisions of the Privacy Act concerning access to records. See 5 U.S.C. § 552a(d).

In his March 9, 1981 grievance filed with the VA, and a November 6, 1981 letter to the Administrator of Veterans Affairs, the plaintiff raised the concerns that are the subject of his Privacy Act complaints. The VA indicated, however, that it did not regard plaintiff's communications as an amendment request. Plaintiff was informed by letter dated March 26, 1982 that he could review his Official Personnel Folder and Management Personnel Folder at any

time and formally request an amendment of his records under § 552a(d)(2) of the Privacy Act. However, the record does not reflect that the plaintiff ever formally requested amendment of his records under § 552a(d)(2) of the Privacy Act, leaving the agency without authority to amend those records. Consequently, although the Privacy Act authorizes judicial review of an agency's failure to maintain accurate, relevant, timely and complete records where the violation has resulted in a determination adverse to the individual, 5 U.S.C. § 552a(g)(1)(A), plaintiff's failure to exhaust his administrative remedies by seeking amendment of his records pursuant to 5 U.S.C. § 552a(d)(2) and 38 C.F.R. § 1.577 must bar plaintiff's claim before this Court.

Finally, plaintiff's sixth cause of

action asserts violations of the Freedom of Information Act (FOIA), 5 U.S.C. § 552, et seq. Specifically, plaintiff alleges that FOIA was violated when the VA failed to respond to plaintiff's inquiries concerning the status of an incentive award suggestion that he submitted to the VA Incentive Awards Officer on September 28, 1981. Plaintiff requests under count six that this Court order the VA to fully comply with plaintiff's future FOIA requests. However, FOIA allows a complainant to bring an action in federal district court only to enjoin an agency from withholding records that have specifically been the subject of a request, or to order the production of documents wrongfully withheld. 5 U.S.C. § 552(a)(4)(B). Accordingly, because the prospective relief sought by the plaintiff is not authorized by the

Act, plaintiff's sixth cause of action must be dismissed.

## Conclusion

Therefore, for the reasons set forth above, it is this 23rd day of January, 1985,

ORDERED that plaintiff's complaint is hereby dismissed in its entirety with prejudice for failure to state a claim upon which relief can be granted.

(signature)

Thomas F. Hogan
United States District Judge

# APPENDIX

# C

## EXPLANATION OF CONSTITUTIONAL, STATURORY, AND REGULATORY PROVISIONS INVOLVED

Included in this Appendix are pertinent constitutional, statutory, regulatory and other provisions. They are quoted verbatim, in pertinent part. Underlining is supplied for emphasis. Except for the quotations of part 213 of title 5, Code of Federal Regulations, all "catchlines" are omitted (part 213 begins at C-23).

Quotations from the U.S. Constitution begin on page C-1; U.S. Code, page C-2; Rules of Civil Procedure for the U.S. District Courts, page C-23; and Code of Federal Regulations, page C-23.

# CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

## United States Constitution

Article III, sections 1 and 2, state:

> Section 1. The judicial Power of the United States, shall be vested in the supreme Court, and in such inferior Courts as the Congress may...establish....
>
> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the laws of the United States...to Controversies to which the United States shall be a party....

Amendment I states:

> Congress shall make no law...abridging the freedom of speech, or of the press; or of the people...to petition the Government for a redress of grievances.

Amendment V states:

> ... Nor shall any person...be deprived of...liberty...without due process of law.

United States Code

Title 5, section 552(a)(3), states:

> ... each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

Title 5, section 552(a)(4)(B), states:

> On complaint, the district court of the United States...has jurisdiction to enjoin the agency from withholding agency records....

Title 5, section 552(a)(6)(A), states:

> Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall--
>
> (i) determine within ten days...after receipt of such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and
>
> (ii) make a determination with respect to any appeal within twenty days.... If on appeal the denial of the request

for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

Title 5, section 552a(d)(d)(1), states:

Each agency that maintains a system of records shall--

(1) upon request by an individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him...to review the record....

Title 5, section 552a(e), states:

Each agency that maintains a system of records shall--

(1) ...;

(2) ...;

(3) ...;

(4) ...;

(5) maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness

to the individual in the determination;

(paragraphs (6)-(11) omitted).

Title 5, section 552a(g)(1), states:

Whenever any agency

(A) makes a determination under subsection (d)(3) of this section not to amend an individual's record...;

(B) ...;

(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating...to the individual...and consequently a determination is made which is adverse to the individual; or

(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

Title 5, section 552a(g)(2), states:

(A) In any suit brought under the provisions of subsection (g)(1)(A) of this section, the court may order the agency to amend the individual's record.... In such a case the court shall determine the matter de novo.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

Title 5, section 552a(g)(4), states:

In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of--

(A) ...; and

(B) the costs of the action together with reasonable attorney fees as determined by the court.

Title 5, section 702, states:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief...denied on the ground that it is against the United States....

Title 5, section 1104, states:

(a) Subject to subsection (b)(3) of this section--

(1) the President may delegate, in whole or in part, authority for personnel management functions...to the Director of the Office of Personnel Management; and

(2) ...;

....

(b)(1) The Office shall establish standards which shall apply to the activities of the Office or any other agency delegated under subsection (a) of this section.

(2) The Office shall establish and maintain an oversight program to ensure that activities under any authority delegated under subsection (a) of this section are in accordance with the merit system principles and the standards established under paragraph (1) of this subsection.

(3) Nothing in subsection (a) of this section shall be construed as affecting the responsibility of the Director to prescribe regulations and to ensure compliance with the civil service laws, rules, and regulations.

(c) ....

Title 5, section 1206(a)(1), states:

The Special Counsel shall receive any allegation of a prohibited personnel practice and shall investigate the allegation to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken.

Title 5, section 2101, states:

For the purpose of this title--

(1) the "civil service" consists of all appointive positions in the executive, judicial, and legislative branches of the Government of the United States, except positions in the uniformed services;

(2) ...; and

(3) ....

Title 5, section 2103(a), states:

For the purpose of this title, the

"excepted service" consists of those civil service positions which are not in the competitive service or the Senior Executive Service.

Title 5, section 2105(a), states:

For the purpose of this title, "employee", except as otherwise provided ..., means an officer and an individual who is--

(1) appointed in the civil service by one of the following acting in an official capacity--

(A) ...;

(B) ...;

(C) ...;

(D) an individual who is an employee under this section;

(E) ...; or

(F) ...;

(2) engaged in the performance of a Federal function under authority of law or an Executive act; and

(3) subject to the supervision of an individual named by paragraph (1) of this subsection while engaged in the performance of the duties of his position.

Title 5, section 2301, states:

(a) This section shall apply to--

(1) an Executive Agency;

(2) ...; and

(3) ....

(b) Federal personnel management should be implemented consistent with the following merit system principles:

(1) Recruitment should be from qualified individuals..., and selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity.

(2) All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management...and with due regard for their privacy and constitutional rights.

(3) Equal pay should be provided for work of equal value....

(4) ....

(5) The Federal work force should be used efficiently and effectively.

(6) ....

(7) Employees should be provided effective education and training....

(8) Employees should be--

(A) protected against arbitrary action, personal favoritism..., and

(B) ....

(9) Employees should be protected against reprisal, for the lawful disclosure of information which the employees reasonably believe evidences--

(A) a violation of any law, rule, or regulation, or

(B) mismanagement, a gross waste of funds, an abuse of authority, ....

....

(c) In administering the provisions of this chapter--

(1) with respect to any agency..., the President shall...take any action, including the issuance of rules, regulations, or directives; ...

(2) ...;

...which the President...determines is necessary to ensure that personnel management is based on and embodies the merit system principles.

Title 5, section 2302, states:

(a)(1) For the purpose of this title, "prohibited personnel practice" means any action described in subsection (b) of this section.

(2) For the purpose of this section--

(A) "personnel action" means--

(i) an appointment;

(ii) a promotion;

(iii) ...;

(iv) ...;

(v) ...;

(vi) ...;

(vii) ...;

(viii) a performance evaluation...;

(ix) a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion...; and

(x) ...;

with respect to an employee in, or applicant for, a covered position in an agency;

(B) "covered position" means any position in the competitive service, a career appointee position in the Senior Executive Service, or a position in the excepted service, but does not include--

(i) a position which is excepted from the competitive service because of its

confidential, policy-determining, policy-making, or policy-advocating character; or

(ii) any position excluded from the coverage of this section by the President based upon a determination by the President that it is necessary and warranted by conditions of good administration.

(C) "agency" means an Executive agency...

(i) ...;

(ii) ...; or

(iii) ....

(b) Any employee who has the authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority--

(1) ...;

(2) solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests or is under consideration for any personnel action unless such recommendation or statement is based on the personal knowledge or records of the person furnishing it and consists of--

(A) an evaluation of the work performance, ability, aptitude, or general qualifications of such individual; or

(B) an evaluation of the character, loyalty, or suitability of such individual;

(3) ...;

(4) deceive or willfully obstruct any person with respect to such person's right to compete for employment;

(5) ...;

(6) grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment...for the purpose of improving or injuring the prospects of any particular person for employment.

(7) ...;

(8) take or fail to take a personnel action with respect to any employee or applicant for employment as a reprisal for--

(A) a disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences--

(i) a violation of any law, rule, or regulation, or

(ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,

if such disclosure is not specifically

prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or

(B) a disclosure to the Special Counsel of the Merit System Protection Board, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences--

(i) a violation of any law, rule, or regulation, or

(ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

(9) ...;

(10) discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant...; or

(11) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing...the merit system principles contained in section 2301....

....

(c) The head of each agency shall be

responsible for the prevention of prohibited personnel practices, for the compliance with and enforcement of applicable civil service laws, rules, and regulations, and other aspects of personnel management. Any individual to whom the head of an agency delegates authority for personnel management, or any aspect thereof, shall be similarly responsible within the limits of the delegation.

(d) ....

Title 5, section 3320, states:

The nominating or appointing authority shall select for appointment to each vacancy in the excepted service in the executive branch...from the qualified applicants in the same manner and under the same conditions required for the competitive service by sections 3308-3318 of this title ....

Title 5, section 4103(a), states:

In order to increase economy and efficiency in the operations of the agency and to raise the standards of performance by employees..., the head of each agency...shall establish, operate, and maintain a program or programs...for the training of employees in or under the agency.... Each program...shall--

(1) ...;

(2) ...; and

(3) provide for the encouragement of self-training by employees by means of appropriate recognition of resultant increases in proficiency, skill, and capacity.

....

Title 5, section 4302, states:

(a) Each agency shall develop one or more performance appraisal systems which--

(1) provide for periodic appraisals of job performance of employees;

(2) encourage employee participation in establishing performance standards; and

(3) use the results...as a basis for training, rewarding, reassigning, promoting, reducing in grade, retaining, and removing employees; (sic)

(b) Under regulations which the Office of Personnel Management shall prescribe, each performance appraisal system shall provide for--

(1) establishing performance standards which will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria...;

(2) as soon as practicable...at the

beginning of each...appraisal period, communicating to each employee the performance standards and the critical elements of the employee's position;

(3) evaluating each employee during the appraisal period on such standards;

(4) recognizing and rewarding employees whose performance so warrants;

(5) ...; and

(6) ....

Title 5, section 4302a, states:

(a) Each agency shall develop one or more performance appraisal systems for employees covered by chapter 54 of this title which--

(1) provide for periodic appraisals of job performance of such employees;

(2) require the joint participation of the supervising official and the employee in developing performance standards with authority for establishing standards resting with the supervising official; and

(3) use the results of the performance appraisals as a basis--

(A) for adjusting the base pay and making performance award decisions with respect to any such employee in

accordance with the applicable provisions of such chapter 54; and

(B) for training, rewarding, reassigning, promoting, reducing in grade, retaining, and removing any such employee.

(b) Under regulations which the Office of Personnel Management shall prescribe, each performance appraisal system under this section shall provide for--

(1) ...;

(2) ...;

(3) communicating, at the beginning of each appraised period and in writing, to each employee...the performance standards and critical elements of the employee's position;

(4) evaluating each such employee during the appraisal period on the basis of such standards;

(5) ...;

(6) ....

(c)(1) Appraisals of performance under this section--

(A) shall take into account individual performance and may take into account organizational accomplishment;

(B) shall be based on factors such as--

(i) any improvement in efficiency,

productivity, and quality of work or service, including any significant reduction in paperwork;

(ii) cost efficiency;

(iii) timeliness of performance;

(iv) other indication of effectiveness, productivity, and quality of performance of the employees for whom the employee is responsible; and

(v) meeting affirmative action goals and achievement of equal employment opportunity requirements;

(C) ...;

(D) ...; and

(E) ....

(2) ....

(d) ....

(e) In carrying out this section, neither the Office nor any other agency may prescribe a distribution of levels of performance ratings for employees covered by chapter 54 of this title.

(f) ....

(g) ....

Title 5, section 5401, states:

It is the purpose of this chapter to provide for a performance management and recognition system which shall--

(1) use performance appraisals as the basis for (a) determining adjustments in basic pay by general pay increases and merit increases, and (b) making performance award determinations;

(2) within available funds, recognize and reward quality performance by varying amounts of performance and cash awards;

(3) ...;

(4) ...; and

(5) ....

Title 5, section 5407

The head of an agency may pay a cash award to, and incur necessary expenses for the honorary recognition of, any employee who is covered by this chapter, and who--

(1) by the employee's suggestion, invention, superior accomplishment, or other personal effort, contributes to the efficiency, economy, or other improvement of government operations, or achieves a significant reduction in paperwork; or

(2) performs a special act or service

in the public interest in connection with or related to the employee's Federal employment.

Title 5, section 7211, states:

The right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interferred with or denied.

Title 28, section 1254, states:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil ...case, before or after rendition of judgment or decree;

(2) ...;

(3) ....

Title 28, section 1331, states:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.



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Title 28, section 1361, states:

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

Title 28, section 1651, states:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions....

Title 28, section 2201, states:

> (a) In a case of actual controversy within its jurisdiction, ...any Court of the United States...may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought....
>
> (b) ....

Title 28, section 2202, states:

> Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

## Rules of Civil Procedure for the United States District Courts

Fed. R. Civ. P. 12(b) states:

> How Presented. Every defense, in law or fact, to a claim for relief in any pleading...shall be asserted in the responsive pleading thereto, if one is required, except that the following defenses may at the option of the pleader be made by motion: ...(6) failure to state a claim upon which relief can be granted....

## Code of Federal Regulations

Title 5, section 6.3(b), states:

> To the extent permitted by law and the provisions of this part, appointments and position changes in the excepted service shall be made in accordence with such regulations and practices as the head of the agency concerned finds necessary.

Title 5, part 213, states:

> Subpart C--Excepted Schedules
>
> Schedule A
>
> § 213.3101 Positions other than those of a confidential or policy-determining character for which it is impracticable to examine.

(a) Upon specific authorization by OPM, agencies may make appointments under this section to positions which are not of a confidential or policy-determining character, and which are not in the Senior Executive Service, for which it is not practicable to examine. Examining for this purpose means application of the qualification standards and requirements established for the competitive service. Positions filled under this authority are excepted from the competitive service and constitute Schedule A....

(b) ....

(c) ....

(d) ....

(e) ....

(f) ....

§ 213.3102 Entire executive civil service.

(a) ....

(b) ....

(c) ....

(d) Attorneys.

(e) through (11) omitted.

§§ 213.3199 through 213.3302 omitted.

Title 5, section 293.302, states:

> Each agency shall establish an Official Personnel Folder for each employee.... Except as provided for in Federal Manual Supplement 293-31, there will be only one Official Personnel Folder maintained for each employee.

Title 5, section 293.303, states:

> The Official Personnel Folder of each employee in a position subject to civil service rules and regulations is under the jurisdiction and control of, and is part of the records of, the Office of Personnel Management.

Title 5, section 293.304, states:

> The head of each agency shall maintain in the Official Personnel Folder the reports of selection and other personnel actions named in section 2951 of title 5, United States Code. The folder shall also contain permanent records affecting the employee's status and service as required by the Office's instructions and as designated in FPM Supplement 293-31.

Title 5, section 302.102, states:

> (a) To the extent permitted by statute and this chapter, each appointment, position change, and removal in the excepted service shall be made in

accordance with any regulations or practices that the head of the agency concerned finds necessary.

(b) ....

(c) Upon a finding by OPM that in a particular situation the action will be in the interest of good administration, OPM may authorize an agency to make appointments to specified positions in the excepted service in the same manner as to positions in the competitive service....

Title 5, section 771.301, states:

(a) Establishment. Each agency covered by this part shall establish and administer an agency grievance system in accordance with the criteria in § 771.302 of this subpart.

(b) Publication. Each agency shall publish and make available to employees copies of its administrative grievance procedures.

Title 5, section 771.302, states:

The following criteria shall govern the establishment and administration of an agency administrative grievance system:

(a) Prompt consideration of each grievance, including reasonable time limits for processing the grievance.

(b) Procedures appropriate for the matter being grieved which provide an employee a reasonable opportunity to present a grievance and receive fair consideration of the matter being grieved. The procedures shall provide for fact-finding, when appropriate, which shall include a hearing when one is suitable to ascertain the circumstances concerning the grievance. Fact-finding procedures shall be carried out by a person(s) who has not been involved in the matter being grieved and who does not occupy a position subordinate to any official who recommended, advised, made a decision on, or who otherwise is or was involved in the matter being grieved.

(c) ....

(d) ....

(e) ....

(f) At any time an employee places a grievance in writing, a written decision, which includes a report of findings and reasons for the determination, made by:

(1) An official at a higher level than any employee involved in any phase of the grievance, except when the head of the agency has been involved, or

(2) The official(s) designated to determine the disputed facts.

Title 5, section 771.303, states:

> An employee in exercising the entitlement to present a grievance under this part shall:
>
> (a) Comply with appropriate time limits established by the agency;
>
> (b) Furnish sufficient detail to clearly identify the matter being grieved; and
>
> (c) Specify the personal relief being requested.

Title 5, section 771.304, states:

> The Office of Personnel Management shall review from time to time each agency administrative grievance system developed under this part to determine whether the administrative grievance system meets the requirements of this part. The Office shall require corrective action to bring a system which fails to meet the requirements into conformity. The Office does not act on a request by an employee to review the processing of or the decision on, an individual grievance.

Title 38, section 0.735-10, states

> (a) ....
>
> (b) An employee shall avoid any action which might result in, or create

the appearance of:

(1) ...;

(2) Giving preferential treatment to any person...;

(3) ...;

(4) Losing complete independence or impartiality;

(5) ...;

(6) ....

(c) Employees shall not discriminate on the ground of race, color, sex, religion, or national origin.... They shall not discriminate on those grounds or any other improper ground in any employment matter. Employees are responsible to cooperate in making equal opportunity for all a reality in the Veterans Administration.

Title 38, section 0.735-21(o), states:

.... Violations of personnel laws or rules may be reported directly to the Director, Investigation and Security Service when the matter is not appropriate for the grievance or appeals procedure. Employees who furnish such evidence...shall not be penalized in any way for doing so. They will also be assured that appropriate inquiry will be made.

AFFIDAVIT OF SERVICE

I HEREBY STATE that I served the foregoing Petition for a Writ of Certiorari, with Appendices, on the following respondents: United States of America; Veterans Administration (VA); Administrator of Veterans Affairs; VA General Counsel; Robert E. Coy, as VA Deputy General Counsel; VA Assistant General Counsel, Professional Staff Group II; Chairman, Board of Veterans Appeals; Office of Personnel Management (OPM); and Director of OPM. The address of each of these is at Washington, D.C. These are all of the parties required to be served. I accomplished this service by mailing three copies of the Petition and Appendices to the Solicitor General, 10th and Constitution Ave., N.W., Room 5614, Washington, D.C. 20530, on May , 1986.

I hereby swear under penalty of perjury

that the information contained in this affidavit of service is true to the best of my knowledge and belief.

_____

G. DUDLEY PEARCE,
Petitioner, pro se

Executed on May _____, 1986.